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UNITED STATES SUPREME COURT

JUNE, 1992

ANTHONY C. PRUDHOMME, ET AL

VERSUS

TENNECO OIL COMPANY, ET AL

ON REHEARING BY

THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

HOMER ED BAROUSSE, JR.
ATTORNEY FOR ANTHONY C. PRUDHOMME
and HENRIETTA G. PRUDHOMME
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91

QUESTIONS PRESENTED FOR REVIEW

I. When the Court of Appeal concludes that the District Court has abused its discretion in a material fashion which is prejudicial to one defendant, is the proper remedy a dismissal of the plaintiffs' case or a remand for further proceedings consistent with the guidelines issued by the Court of Appeal directed to the District Court?

II. When a District Court abuses its discretion in a material fashion, is the integrity of the judicial system best preserved by placing the parties in the same position as they were before the abuse of discretion occurred?

III. Whether a case involves either general negligence or fault based on strict liability, when the evidence is the same regardless of the theory of liability, is it an abuse of discretion to apply the evidence to the theory adopted by the District Court?

LIST OF ALL PARTIES

PLAINTIFFS:

ANTHONY C. PRUDHOMME

HENRIETTA PRUDHOMME

DEFENDANTS:

TENNECO OIL COMPANY

BOOKER DRILLING COMPANY
D/B/A GRACE OFFSHORE COMPANY

WESTERN ATLAS OFFSHORE COMPANY

CNA INSURANCE COMPANY

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TABLE OF AUTHORITIES

I. 28 U.S.C., Section 2106

The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances. (June 25, 1948, c. 646, Stat. 963.)

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GROUNDS ON WHICH JURISDICTION IS INVOKED

The date of the entry of judgment sought to be reviewed in this matter is April 13, 1992.

The jurisdiction of this Honorable Court is based upon 28 U.S.C., Section 1254(1):

> "Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods: (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;
> ..."

STATEMENT OF THE CASE

Anthony C. Prudhomme was employed by Western Atlas Offshore Company ("Western"), an oil and gas service business. Grace Offhore Company, Inc. d/b/a Booker Drilling Company ("Booker"), was a drilling contractor engaged in oil and gas exploration on the Outer Continental Shelf. Tenneco Oil Company owned a stationary platform known as Shipshoal 198J, located approximately 100 miles offshore. Tenneco contracted with Booker to drill for oil and gas on its lease, and contracted with Western to "log" the hole after it was drilled by Booker.

On or about August 11, 1988, while Booker was engaged in drilling activities, a hydraulic hose attached to

a piece of its equipment burst, causing hydraulic oil to spill below where plaintiff was working. As Prudhomme was moving about on the deck below, he slipped and fell in the hydraulic oil spill, thereby sustaining injuries to his lower back.

In March of 1989, Prudhomme filed a complaint in the United States District Court, Western District of Louisiana, against Tenneco Oil Company and Booker Drilling Company, alleging theories of liability predicated upon general negligence and under Louisiana Civil Code Article 2317 and related articles on strict liability.

In November of 1990, a pre-trial conference was conducted before the Honorable Richard J. Putnam, District Court Judge for the Western District of

Louisiana. The pre-trial stipulation included theories of liability under general negligence and strict liability. In December, 1991, Prudhomme filed an amendment to the original complaint specifically alleging strict liability against Booker, which was subsequently withdrawn for reasons not stated.

On March 25, 1991, proposed Findings of Fact and Conclusions of Law submitted by all parties addressed the issues of negligence and strict liability.

On April 3, 1991, the date of trial, an extensive discussion was held in Chambers presided over by District Judge Putnam. At that time, counsel for Booker raised a perfunctory objection to plaintiff proceeding on a theory of strict liability, which was promptly

overruled by the court. Prior to commencement of trial, on record, Booker preserved its argument. The court's ruling was the same as in Chambers.

Following two days of testimony, the trial court concluded that the hydraulic hose which had burst and caused the oil spill below was defective and that Booker was liable under a theory of strict liability.

On appeal, the United States Court of Appeal for the Fifth Circuit held that the District Court abused its discretion when it permitted Prudhomme to proceed on the basis of strict liability, in effect reversing the District Court's judgment against Booker on the theory of strict liability. The Court of Appeal concluded that since there was no appeal on the issue of whether Booker was negligent,

that "the Prudhommes take nothing", thereby completely vacating the judgment of the District Court. On rehearing, the plaintiff argued that the decision by the Court of Appeal constituted a reversal of a finding of fact by the lower court and that proper recourse should be a remand, where both parties are placed in a position at the time of the alleged abuse of discretion.

ARGUMENT

The Court of Appeal incorrectly reversed the trial court after a finding of abuse of discretion instead of remanding the case for further proceeding consistent with the holding of the Court of Appeal. Its decision meant that plaintiff is denied all relief after: having proved fault on the premise of strict liability following two days of testimony and rendering reasonably based findings of fact and application of law, albeit on a theory allegedly not pled. In this situation, a remand is the appropriate remedy.

The fact situation was simple. Both plaintiff and defendant were subcontractors, working on a stationary platform on the Outer Continental Shelf. A hydraulic hose owned by defendant

ruptured, thereby causing hydraulic oil to spill on the deck below where plaintiff was working. Plaintiff walked across the aisle and slipped and fell. Plaintiff filed suit against the defendants, alleging that Booker had failed to properly maintain drilling equipment to prevent a leakage of fluids from above to a deck below, thereby creating a hazardous condition.

The evidence presented included the testimony of Charles Cavin and Paul Callahan, both senior supervisors and employees of Booker, and eyewitnesses to the accident, from whose testimony it was proven that the hydraulic hose had burst under normal working pressure. This constitutes a defective condition under Louisiana law, imposing strict liability upon Booker, who was responsible for

properly maintaining the equipment. The hose which had burst had been discarded and was not available for trial. Little, if any, other evidence could have been presented before the court. Therefore, in these circumstances under Louisiana Civil Code Article 2317, where the party in control of a thing which is defective causes harm to another, that party is legally responsible for the victim's damages.

On the morning of trial, Booker objected to plaintiff pursuing a claim against Booker on the premise of strict liability (a defective hose). The trial court overruled Booker and held that considering the pre-trial pleadings, motions, arguments, and memoranda, the issue of strict liability was properly before the court and that no party was

prejudiced. Furthermore, the record at page 5 reflects not only the court's reasoning, but also the understanding of counsel for co-defendant, Tenneco:

> THE COURT: That's your understanding of the case? What was your understanding of the case?
>
> MR. MARTIN (counsel for Tenneco, co-defendant): Your Honor, my understanding of the case, there was allegations in the plaintiff's petition.
>
> THE COURT: Specifically say that Tenneco is liable on strict liability as the owner of the platform?
>
> MR. MARTIN: I didn't say as owner of the platform. The allegations against Booker in Paragraph 6, B-4 indicates that the plaintiff is contending they are liable to him for, I quote, failure to properly maintain and inspect the drilling equipment to prevent a leakage of fluids from above to a deck below, thereby creating a hazardous condition; and my position is that that would be sufficient to state a claim for product defect or liability in 2317. Of course, I am not commenting one way or the other as to whether or not the plaintiff

> can prove a defect or not; but I think the pleadings are broad enough to include that allegation against Booker, Your Honor. But there was an allegation against Tenneco, and of course for strict liability. So we are not really a party to this argument.

Nonetheless, the Court of Appeal concluded that the trial court abused its discretion in allowing plaintiff to proceed on a theory of strict liability. Clearly, the Court of Appeal should have remanded, rather than reversed, thereby placing both parties in a position where the alleged abuse of discretion occurred.

Ordinarily, in a case where the district court judge has failed to exercise his discretion properly, the remedy is to remand for a further exercise in such discretion. Durand v. Elrod, 760 F.2d 756 (7th Cir., 1985). Consistent with this approach, the Ninth

Circuit has held that in a situation where the record is unclear what the district court judge intended, nothing could be accomplished by guessing what the district court judge intended, and the appropriate disposition is remand. Moore v. Telefon Communication Corporation, 589 F.2d 959 (9th Cir., 1978). See, also, Colonial Refrigerated Transportation, Inc. v. Worsham, 705 F.2d 821 (6th Cir., 1983).

The decision by the Court of Appeal dismisses plaintiff from court and creates a prohibited advantage to Booker because not only are the parties placed in a different position at the time of the alleged abuse of discretion, but the defendant completely escapes liability where the facts proven have established fault. This decision by the Court of

Appeal establishes a standard for review wherein reviewing courts can simply reverse a reasonably based finding of fact on the premise that the District Court has abused its discretion. Such a result is entirely inconsistent with the existing standard of review by higher courts of an abuse of discretion by the district courts.

The pleadings set forth by plaintiff are broad enough to include the theory of strict liability relied upon by the trial court. The appellate courts review the facts to find (1) whether the pleadings were consistent with the theory relied upon by the court and (2) whether there was some evidence to support the court's finding.

It is inconceivable that Booker did not realize that plaintiff was pursuing a

claim against it on the established fact that its hose had burst under normal working pressure, a fact that was established by the testimony extracted from its own witnesses. Our courts have consistently held that the district court must construe pleadings liberally and the defendant must be placed on adequate notice concerning theories of liability. The purpose of the pleadings is to give adequate notice to defendants of its cause of action. See Torres Ramirez v. Bermudez Garcia, 898 F.2d 224 (1st Cir., 1990). In Jahnke Construction Co. v. Vulcan Materials Co., 527 F.2d 772 (7th Cir., 1976), the court was faced with the issue as to whether the district court erred in deciding its case on the theory of promissory estoppel, which was not pled. Plaintiff had pled a contract

theory of express warranty. In concluding, the court held that the pleadings were broad enough to include a theory relied upon by the court, and that where substantial evidence supported the court's findings, the alternate theory decision was proper. Similarly, the finding under strict liability by the district court in Prudhomme was sufficiently pled where the defendant had adequate notice in the pleadings, and especially where the evidence overwhelmingly supported the judge's finding of a defect.

CONCLUSION

In the interest of justice and without prejudice to Booker, this matter should be remanded back to the district court with instructional guidelines to

remedy any abuse of discretion and place both parties at the position at the time of the abuse. Remand, not reversal of judgment, should have been ordered by the Court of Appeal. Alternatively, the decision by the Court of Appeal should be reversed, and the decision by the district court reinstated for either the reason that the district judge did not abuse his discretion, or that the pleadings were broad enough to incorporate the theory relied upon by the district court judge.

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UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF LOUISIANA

LAFAYETTE-OPELOUSAS DIVISION

ANTHONY C. PRUDHOMME and HENRIETTA PRUDHOMME	*	CIVIL ACTION
	*	NO. CV89-0708
VERSUS	*	
	*	SECTION "L"
TENNECO OIL COMPANY and BOOKER DRILLING COMPANY d/b/a GRACE OFFSHORE COMPANY	*	JUDGE DUHE
	*	MAG. METHVIN
	*	

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COMPLAINT FOR DAMAGES

TO THE HONORABLE, THE ABOVE DESIGNATED COURT:

The complaint of ANTHONY C. PRUDHOMME and HENRIETTA PRUDHOMME, hereinafter referred to as complainants, husband and wife, and both persons of the full age of majority, and with respect represents:

1.

This Court has jurisdiction by virtue of 43 USC 1331, et seq, the Outer

Continental Shelf Lands Act.

2.

The following parties are cited herein as defendants, TENNECO OIL COMPANY, a foreign corporation authorized to do and doing business in the State of Louisiana, and in the Western District, and BOOKER DRILLING COMPANY, d/b/a GRACE OFFSHORE COMPANY, a domestic corporation, authorized to do and doing business in the State of Louisiana.

B. BOOKER DRILLING COMPANY d/b/a GRACE OFFSHORE COMPANY negligence:

1) Failure to properly maintain and inspect the floor where complainant slipped and fell, and place it in a condition reasonably safe for complainant and free from defects and conditions rendering it unsafe;

2) Failure to warn complainant of the dangerous and unsafe condition existing;
3) Failure to properly maintain and inspect the premises to prevent such unsafe conditions from existing;
4) Failure to properly maintain and inspect the drilling equipment to prevent a leakage of fluids from above to a deck below, thereby creating a hazardous condition.

EDWARDS, STEFANSKI, BAROUSSE,
CUNNINGHAM, STEFANSKI & ZAUNBRECHER
J. Michael Stefanski, Attorney for Complainants
P.O. Drawer 730, Crowley, LA 70527

March 30, 1989

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF LOUISIANA

LAFAYETTE-OPELOUSAS DIVISION

ANTHONY C. PRUDHOMME and HENRIETTA PRUDHOMME	*	CIVIL ACTION
	*	NO. CV89-0708
VERSUS	*	
	*	SECTION "O"
TENNECO OIL COMPANY and BOOKER DRILLING COMPANY d/b/a GRACE OFFSHORE COMPANY	*	JUDGE PUTNAM
	*	MAG. METHVIN

****

JOINT PRE-TRIAL STIPULATIONS

A conference of attorneys was held in the above entitled cause on the 31st day of July, 1990.

a) J. Michael Stefanski appeared as counsel for ANTHONY C. PRUDHOMME and HENRIETTA PRUDHOMME;

b) Shawn O'Neill appeared as counsel for TENNECO OIL COMPANY;

c) Fred T. Hinrichs and Charles W. Schmidt, III, appeared for GRACE OFFSHORE COMPANY: and

d) C. Dean Domingue appeared as counsel for Intervenor, WESTERN ATLAS OFFSHORE COMPANY and CNA INSURANCE COMPANY.

1. Jurisdiction is established under 33 U.S.C. 901, et seq., the Longshore and Harbor Workers' Compensation Act through the Outer Continental Shelf Lands Act, 42 U.S.C. 1331, et seq.

2. There is a pending Motion for Summary Judgment filed on behalf of TENNECO OIL COMPANY, and a pending Motion for Summary Judgment filed on behalf of GRACE OFFSHORE COMPANY.

3. In general, the plaintiff claims:

The plaintiff claims that on or about August 11, 1988, he slipped and fell on a substance identified as

hydraulic oil on the deck of a stationary platform, Ship Shoal 198-J located on the Outer Continental Shelf. The platform was owned by TENNECO OIL COMPANY, and GRACE OFFSHORE COMPANY was contracted by TENNECO OIL COMPANY to drill "Well No. 6." The hydraulic oil originated from a hydraulic hose which had burst on the drill floor just above where plaintiff was working. The oil spilled below on the steel deck. Plaintiff was employed by WESTERN ATLAS OFFSHORE COMPANY as a wireline operator, and he was working on his equipment below the drilling platform, preparing to conduct wireline operations as soon as the drill crew had finished their job. Plaintiff was walking to use the restroom, when he slipped and fell on the hydraulic oil, landing on his tailbone.

Plaintiff alleges that as a result of his accident, he had sustained a disc injury which will require surgery. As a result of his injuries, plaintiff is suing drilling contractor for causing the oil spill, and TENNECO OIL COMPANY owned the platform.

4. In general, the defendants' claims:

TENNECO OIL COMPANY:

Although the plaintiff is claiming injuries as a result of a slip and fall accident which occurred on TENNECO OIL COMPANY'S fixed drilling platform located at Ship Shoal Block 198, TENNECO OIL COMPANY cannot be assessed with any liability in this litigation. Although TENNECO OIL COMPANY was the owner of the rig, an independent contractor, GRACE OFFSHORE COMPANY, also made a defendant

in this matter, had been employed by TENNECO to perform the entirety of the workover operations which were taking place on the platform in question. TENNECO OIL COMPANY as the principal cannot be held liable for the negligence, strict or otherwise, of its independent contractor.

GRACE OFFSHORE COMPANY:

GRACE denies that it was negligent in any way for plaintiff's alleged accident. Defendant acknowledges that plaintiff claims to have slipped in hydraulic oil on the TENNECO platform deck below the rig floor. GRACE also acknowledges that during the course of its workover operations on the TENNECO platform, a hydraulic hose attached to a Foster Power Tong Unit ruptured, leaking a small amount of hydraulic fluid. The

GRACE driller, Mr. Charles Cavin, immediately sent floorhand Melvin Guidroz, Jr. from the rig floor to the platform deck to look for any oil that may have leaked from the busted hydraulic hose to the platform deck below. Mr. Guidroz proceeded immediately to the platform deck below the rig floor, and arrived on the alleged accident scene within two to three minutes of the rupture of the hose. If plaintiff's injury occurred as alleged, which is at all times denied, it occurred within an extremely brief time period of two to three minutes, the time it took Mr. Melvin Guidroz to travel from the rig floor to the TENNECO platform deck below the rig floor. Defendant GRACE submits that under these circumstances, it would be afforded a reasonable amount of time

to take corrective measures and to remedy any dangerous condition. GRACE satisfied its duty under the law by immediately dispatching a floorhand to the platform deck.

WESTERN ATLAS OFFSHORE COMPANY AND CNA INSURANCE COMPANY, Intervenors:

In general, intervenors, WESTERN ATLAS OFFSHORE COMPANY and CNA INSURANCE COMPANY claim that it has paid to or on behalf of ANTHONY PRUDHOMME a total of $8,642.00 in indemnity payments, and $8,515.00 in medical payments, pursuant to the Longshoreman and Harbor Workers' Act, as a result of an accident that occurred on or about August 11, 1988, when ANTHONY PRUDHOMME was employed by WESTERN ATLAS OFFSHORE COMPANY as a wireline operator. Plaintiff was working on a BOOKER DRILLING COMPANY drilling

rig, said BOOKER DRILLING rig performing drilling operations on a fixed production platform on the Outer Continental Shelf, said platform being owned and operated by TENNECO OIL COMPANY. CNA INSURANCE COMPANY was the Longshore and Harbor Workers' compensation insurer of WESTERN ATLAS OFFSHORE COMPANY at the time of the cause of action. The accident was caused exclusively by the negligence and/or strict liability of defendants, BOOKER DRILLING COMPANY d/b/a GRACE OFFSHORE COMPANY and/or TENNECO OIL COMPANY.

7. The contested issues of law are:

COMPLAINANTS:

a) Are the defendants subject to strict liability under Louisiana law or the defendants liable under general negligence.

TENNECO OIL COMPANY:

The contested issues of law include whether there was negligence on the part of any party under Louisiana Civil Code Articles 2315, 2317 or 2322. The issue of a principals culpability for the acts of an independent contractor over which the principal has no operational control is also present in this litigation.

GRACE OFFSHORE COMPANY:

a) Negligence of GRACE OFFSHORE COMPANY, INC.;

b) Negligence and/or comparative fault of plaintiff;

c) Negligence of other parties;

d) Whether the negligence of any party was the legal cause of plaintiff's alleged accident and injuries;

e) Nature and extent of plaintiff's damages;

f) All those issues of law implicit in the above statements of fact.

EDWARDS, STEFANSKI, BAROUSSE, CUNNINGHAM, STEFANSKI & ZAUNBRECHER
J. MICHAEL STEFANSKI, Attorney for Complainants, Crowley, LA

SHAWN O'NEILL, Attorney for Tenneco Oil Company, Lafayette, LA

FRED HINRICHS, Attorney for Booker Drilling Co. d/b/a Grace Offshore Co., New Orleans, LA

July 23, 1990

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF LOUISIANA

LAFAYETTE-OPELOUSAS DIVISION

ANTHONY C. PRUDHOMME and HENRIETTA PRUDHOMME	*	CIVIL ACTION
	*	NO. CV89-0708
VERSUS	*	
	*	SECTION "L"
TENNECO OIL COMPANY and BOOKER DRILLING COMPANY d/b/a GRACE OFFSHORE COMPANY	*	JUDGE DUHE
	*	MAG. METHVIN

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FINDINGS OF FACT AND CONCLUSIONS OF LAW

FINDINGS OF FACT

I.

On August 11, 1988, Anthony C. Prudhomme was employed by Western Atlas Offshore as a wireline operator and was working aboard a stationary platform identified as Shipshoal 198-J on the Outer Continental Shelf.

II.

Tenneco Oil Company owned the

platform, and Booker Drilling Company d/b/a Grace Offshore Company, was contracted by Tenneco to perform workover operations.

III.

As Booker was coming out of the hole and breaking out pipe, a hydraulic hose attached to a Foster power tong unit ruptured while in normal use and under pressure, causing oil to spew from the rig floor to the lower Tenneco platform deck where plaintiff was walking. Booker owned and had custody of the hose and power tong unit.

IV.

The Booker driller responded immediately to the break in the hose by dispatching a floorhand to the lower deck to clean up any hydraulic fluid which may have spilled onto the lower deck.

V.

As Anthony Prudhomme left his work area to go to the galley, he walked across the area where the oil had spilled, and slipped and fell, sustaining an injury to his back. As a result of the accident, Prudhomme did not return to work. He eventually was incarcerated on or about February 15, 1990 for criminal charges to which he pled guilty. Prudhomme was sentenced to life imprisonment.

VI.

For three years prior to his accident, Prudhomme was earning wages which averaged $22,635.00 annually. Also, separate and apart from his workmen's compensation intervention, Prudhomme sustained $7,000.00 in medical expenses in addition to the medical

expenses paid by CNA Insurance Company as set out below.

VII.

Prudhomme was working in the course and scope of his employment at the time he was injured. CNA Insurance Company was the workman's compensation insurer of Western Atlas and CNA paid to or on behalf of Prudhomme a total of $8,898.07 in medical benefits and $8,642.00 in indemnity compensation benefits.

VIII.

Western Atlas and CNA filed a petition of intervention in these proceedings seeking reimbursement of the amounts paid to or on behalf of Prudhomme.

IX.

The accident occurred on a fixed platform on the Outer Continental Shelf off the Louisiana coast and Prudhomme is

covered by the Longshore & Harborworker's Compensation Act. Louisiana law applies pursuant to the Outer Continental Shelf Lands Act, 43 U.S.C.A. Sec. 1331, specifically Sec. 1333(a)(2)(A).

CONCLUSIONS OF LAW

I.

Under Louisiana Civil Code Article 2317, the owner or custodian of a defective thing which causes injury to another is responsible for damages caused by the defective thing. See Loescher v. Parr, 324 So.2d 441 (La. 1975). The hydraulic hose ruptured under normal working conditions as Booker was attempting to break pipe. The cause of the rupture is unexplained, however, the rupture itself indicates that the hose was defective. This analysis can be found also in Vicknair v. T.L. James,

375 So.2d 960 (La. App. 4th Cir., 1979), where a metal rim lock came loose after a truck tire blew out. The rim lock rolled across the highway and struck the plaintiff. The owner of the truck was held liable for damages caused by the rim lock which was found to be defective. Also, in Ross v. Lewis, 446 So.2d 1322 (La. App. 2d Cir., 1984), the defendant was held liable when a person was injured by a car battery that exploded under normal use. See also Robertson v. Gulf South Beverage, Inc., 421 So.2d 877 (La. 1982). We hold that Booker is liable to plaintiff for his injuries under this line of jurisprudence.

II.

We further find that the plaintiff was 50% contributorily or comparatively at fault in failing to see the hydraulic

oil on the deck where he was walking, and his recovery will be reduced accordingly.

III.

Since there was no evidence of negligence against Tenneco Oil Company, or evidence that Tenneco Oil Company owned the piece of equipment which caused the oil spill, or that the equipment was permanently attached to Tenneco's platform, any and all claims by plaintiff against Tenneco Oil Company are hereby dismissed.

IV.

Since the evidence shows that Booker took immediate action to clean up the spill on the lower deck and used reasonable care under the circumstances, the court finds that Booker was not negligent under Louisiana Civil Code Article 2315.

V.

Damages for Anthony C. Prudhomme are assessed as follows:

Lost wages (from 8/11/88 through 2/15/90)	$33,042.00
Pain and suffering	$35,000.00
Unpaid medical expenses	$ 7,000.00
Medical expenses paid by employer	$ 8,898.00
SUBTOTAL	$84,840.07
Less 50% comparative fault	$42,420.04
TOTAL DAMAGES	$42,420.03

Damages for Henrietta Prudhomme for loss of consortium are assessed as follows:

Loss of consortium	$ 5,000.00
Less 50% for Anthony Prudhomme's comparative fault	$ 2,500.00
TOTAL	$2,500.00

VI.

The law is well settled that an employer and his worker's compensation insurer are subrogated to the rights of the injured employee to the extent of payments made to or on behalf of the employee. LHWCA, 33 U.S.C. Sec. 933(h). Such recovery by the employer and its insurer is to be paid by preference and priority out of any recovery from third parties without reduction for plaintiff's fault. LHWCA, 33 U.S.C. 933(e). See also Ochoa v. Employers National Insurance Co., 724 F.2d 1171 (5th Cir. 1984).

VII.

Any excess amount awarded to the plaintiff entitles the employer and insurer to a credit against any future benefits owed. LHWCA, 33 U.S.C. Sec.

933(f); Petro-Weld, Inc. v. Luke, 619 F.2d 418 (5th Cir. 1981).

VIII.

Western Atlas Offshore and CNA Insurance Company are entitled to judgment in the total amount of $17,540.07 by preference and priority and payable out of any judgment proceeds owed by the defendants to the plaintiff.

IX.

Western Atlas Offshore and CNA Insurance Company are also entitled to judgment that any payments made to plaintiff by defendants in excess of $17,540.07 operate as a credit against any payments due to plaintiff in the future as compensation benefits under the Longshoremen & Harbor Workers' Compensation Act by Western Atlas Offshore and CNA Insurance Company.

Lafayette, Louisiana, this 3rd day of May, 1991.

RICHARD J. PUTNAM, UNITED STATES SENIOR DISTRICT JUDGE

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF LOUISIANA

LAFAYETTE-OPELOUSAS DIVISION

ANTHONY C. PRUDHOMME and HENRIETTA PRUDHOMME	*	CIVIL ACTION
	*	NO. CV89-0708
VERSUS	*	
	*	SECTION "O"
TENNECO OIL COMPANY and BOOKER DRILLING COMPANY d/b/a GRACE OFFSHORE COMPANY	*	JUDGE PUTNAM
	*	MAG. METHVIN

****

J U D G M E N T

After hearing the pleadings, evidence and arguments of counsel, and stipulations, the court considering the law and evidence to be in favor of the plaintiffs, Anthony and Henrietta Prudhomme, and also in favor of the intervenors, Western Atlas Offshore and CNA Insurance Company, and against the defendant, Booker Drilling Company d/b/a Grace Offshore Company, for the reasons as orally assigned;

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that there be judgment herein in favor of plaintiff, Anthony Prudhomme, and against Booker Drilling Company d/b/a Grace Offshore Company, in the amount of FORTY-TWO THOUSAND FOUR HUNDRED TWENTY AND 03/100 ($42,420.03) DOLLARS, together with interest thereon as provided by law, until paid, and for all costs of these proceedings.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that there be judgment herein in favor of intervenors, Western Atlas Offshore and CNA Insurance Company, and against Booker Drilling Company d/b/a Grace Offshore Company, and plaintiff Anthony Prudhomme, in the sum of SEVENTEEN THOUSAND FIVE HUNDRED FORTY AND 07/100 ($17,540.07) DOLLARS, together with interest thereon as provided by law,

until paid, and for all costs of these proceedings; said judgment in favor of intervenors to be paid by preference and priority out of the judgment rendered above in favor of Anthony Prudhomme.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Intervenors are hereby entitled to a credit and offset for any judgment award in favor of Anthony Prudhomme which is in excess of Intervenors' judgment award, less Anthony Prudhomme's attorney's fees; said credit and offset to be against any liability Intervenors might otherwise owe to plaintiff, Anthony Prudhomme, under the Longshore and Harbor Worker's Compensation Act (LHWCA) or the worker's compensation laws of any state.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that there be judgment herein in

favor of plaintiff, Henrietta Prudhomme, and against booker Drilling Company d/b/a Grace Offshore Company, in the sum of TWO THOUSAND FIVE HUNDRED AND NO/100 ($2,500.00) DOLLARS, with interest thereon as provided by law, until paid, and for all costs of these proceedings.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that any claims by Anthony and Henrietta Prudhomme, or intervenors, against Tenneco Oil Company are hereby dismissed with prejudice.

JUDGMENT READ, RENDERED AND SIGNED this 3rd day of May, 1991.

RICHARD J. PUTNAM, UNITED STATES SENIOR DISTRICT JUDGE

Anthony C. PRUDHOMME, et al.,
Plaintiffs-Appellees,

v.

TENNECO OIL CO., Defendant,

Booker Drilling Co., d/b/a Grace Offshore Co., Defendant-Appellant.

No. 91-4473
Summary Calendar.

United States Court of Appeals,
Fifth Circuit.

March 13, 1992.

Worker injured in slip-and-fall accident while working on stationary drilling platform brought action against platform owner and drilling contractor. The United States District Court for the Western District of Louisiana, Richard J. Putnam, J., exonerated drilling contractor of negligence but found it strictly liable for plaintiff's injury on ground that slip and fall was caused by

hydraulic fluid that leaked onto drilling rig's deck from defective hose attached to equipment belonging to contractor. Platform owner was found innocent of both negligence and strict liability. Contractor appealed. The Court of Appeals, Wiener, Circuit Judge, held that district court abused its discretion when, on morning of trial, it permitted worker to seek recovery on basis of strict liability even though, some three months before trial, district court itself had ordered dismissal of worker's motion to amend complaint to add cause of action in strict liability, since prior dismissal misled contractor and induced prejudicial inaction.

Vacated in part, affirmed in part, and rendered.

xxx

Federal Civil Procedure, Section 881

District court abused its discretion when, on morning of trial, it permitted plaintiff to seek recovery on basis of strict liability even though, some three months before trial, district court itself had ordered dismissal of plaintiff's motion to amend complaint to add cause of action in strict liability, since prior dismissal misled defendant and induced prejudicial inaction; defendant showed that it would have produced eyewitnesses for trial testimony, attempted to locate physical evidence, and retained expert witnesses on aspects of strict liability not common to issue of negligence if it had expected to encounter strict liability at trial.

Appeal from the United States District Court For the Western District of Louisiana.

Before JONES, DUHE' and WIENER, Circuit Judges.

WIENER, Circuit Judge:

This appeal follows the bench trial of a suit in federal district court brought by Plaintiff-Appellee Anthony C. Prudhomme, and his wife, Henrietta G. Prudhomme, against Tenneco Oil Co. (Tenneco) and Booker Drilling Co. d/b/a Grace Offshore Co. (Booker), a drilling contractor. Prudhomme sought damages against Tenneco and Booker for back injuries he allegedly incurred in a slip-and-fall accident while working on a

stationary drilling platform owned by Tenneco, located on the outer continental shelf in the Gulf of Mexico offshore Louisiana. Henrietta Prudhomme sought recovery against the same defendants for loss of consortium. Applying Louisiana law as mandated by the Outer Continental Shelf Lands Act,[1] the district court exonerated Booker of negligence but found it strictly liable for Prudhomme's back injury on the ground that his slip and fall was caused by hydraulic fluid that leaked onto the drilling rig's deck from a defective hose attached to equipment belonging to Booker.[2] On appeal,

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[1] 43 U.S.C. Sec. 1333 (a)(2)(A)

[2] La.Civ.Code Ann.arts 2317 and 2322 (West 1979). The court found co-defendant Tenneco innocent of both negligence and strict liability.

Booker argues that the district court erred in allowing the case to be tried on a theory of strict liability. And even if the strict liability theory was appropriate, Booker argues, the district court erred in finding that the Prudhommes proved that Booker's equipment was defective, and that this defect caused the accident. Agreeing with Booker that the district court abused its discretion in allowing the Prudhommes to proceed to trial on a theory of strict liability, we reverse that part of the judgment and affirm the rest, thereby pretermitting consideration of Booker's other assignments of error.

I.

FACTS AND PROCEEDINGS

On August 11, 1988, while performing services on Tenneco's platform for his employer, Western Atlas Offshore Co., an intervenor in this case, Mr. Prudhomme slipped and fell in hydraulic fluid on the deck and injured his back. In their original complaint, the Prudhommes brought suit against Tenneco for negligence and strict liability, and against Booker for negligence only.

On October 26, 1990, after the period for discovery had expired, Booker moved for summary judgment. In opposition to this motion, the Prudhommes filed a memorandum stating that, among other things, the source of the hydraulic fluid was a ruptured hose on Booker's equipment. Noting that the Prudhommes' response seemed to raise issues of strict liability not simply negligence, Booker

pointed out in a supplemental memorandum that the Prudhommes had never alleged strict liability, and that new claims in strict liability could not defeat its motion for summary judgment. The district court rejected Booker's motion for summary judgment.

On December 21, 1991, shortly before the scheduled date for trial, the Prudhommes filed a motion with the district court for permission to amend their original complaint in order to add a claim in strict liability against Booker. It is important to note that this motion was made after the expiration of the discovery period, after the pre-trial conference, after submission of the Joint Pre-Trial Stipulations, and after the case was set for trial. In a memorandum

supporting this amendment, the Prudhommes acknowledged that, while they had always asserted a claim in strict liability against Tenneco, their prior allegations against Booker "did not mention specifically Louisiana Civil Code articles 2322 and 2317, or strict liability."

Booker immediately opposed the Prudhommes' motion to add a claim of strict liability, arguing that delay and prejudice would result from the need to re-open discovery, amend witness and exhibit lists, and prepare and file a new pre-trial stipulation. Booker also pointed out the potential difficulty of locating essential witnesses, records, and physical evidence. Booker noted that the Prudhommes had long been aware of the

purported factual basis for a cause of action in strict liability, so amendment could not be justified on grounds of newly discovered facts.

Rather than contend with Booker's opposition at the risk of losing their scheduled trial date, on January 16, 1991, the Prudhommes filed a motion asking the district court to dismiss their second supplemental and amended complaint, which asserted strict liability. The district court complied, ordering that complaint dismissed.

Between the date of the district court dismissal order (January 18, 1991) and the date of trial (April 3, 1991), the issue of Booker's strict liability was never again raised or mentioned in

any pleadings or filings by the Prudhommes or by the court. Nevertheless, at pre-trial conference on the morning of trial, the district court announced, sua sponte it appears, that it would consider the Prudhommes' strict liability claim against Booker. Booker protested, but the district court refused to relent. (The record and the briefs to this court do not say precisely what transpired during that pre-trial conference, except that the court advised Booker that while its objection would be noted, trial would commence that morning and would include consideration of Booker's strict liability.)

Immediately upon commencement of the trial, Booker objected once again to any consideration of a claim against it

in strict liability, reiterating the foregoing sequence of events and stating that

> [w]e don't have an expert to prove there wasn't a defect. We assumed all along that this was a case solely on negligence .... We are prepared to try a case in negligence. We are not particularly prepared to try a case in strict liability, ..."

The district court responded, "Your exception is noted, and it's overruled."

During the two-day trial, the Prudhommes adduced no evidence of a defect in the hydraulic hose beyond the bare fact that it developed a leak and spilled hydraulic fluid on the area of the metal deck where Mr. Prudhomme slipped and fell. Booker adduced testimony, on the other hand, that the hose had been inspected frequently and

recently, was in good shape immediately prior to the leakage, and was re-used as soon as the broken segment was removed. Based solely on the fact that the hose broke, the district court found that the hose was defective, and that this defect caused the spilled fluid that, in turn, caused mr. Prudhomme's accident. The district court found Booker strictly liable but not negligent. The court also assessed Mr. Prudhomme's fault at fifty percent, for failure to look where he was walking.

II.

ANALYSIS

A. STANDARD OF REVIEW

We review the district court's decision to allow the trial to proceed,

over Booker's objections, on the basis of strict liability for abuse of discretion.[3] That court's factual findings that the rupture of the hydraulic hose, in and of itself, proved its defectiveness and that the fluid leak caused the accident are reviewed for clear error.[4] Conclusions of law by the district court are subject to plenary review.[5]

B. PROCEEDING TO TRIAL ON STRICT LIABILITY

The district court has broad

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[3] Jon-T Chemicals, Inc. v. Freeport Chem. Co., 704 F.2d 1412, 1417 (5th Cir. 1983).

[4] Fed.R.Civ.P. 52(a). Halferty v. Pulse Drug Co., Inc., 864 F.2d 1185, 1188 (5th Cir. 1989).

[5] Id.

discretion in the management of its docket and the trial of lawsuits pending before it -- and appropriately so. In particular, the trial court's broad discretion in granting out-of-time motions to file supplemental and amended pleadings is so recognized as to require no citation. In fact, the appellate courts and the Federal Rules of Civil Procedure encourage liberality in granting such motions, as illustrated by Fed.R.Civ.P. 15 (Rule 15) and the notes of the Advisory Committee pertaining to it. But the issue of granting tardy motions to permit the filing of amendments to pleadings is not the real issue before us in this appeal. Rather, we consider a substantially different matter: whether here the district court abused its discretion when, on the very

morning of trial, it permitted the claimant to seek recovery on the basis of strict liability even though, some three months before the trial, the district court itself had ordered the dismissal of the Prudhommes' motion to amend their complaint to add a cause of action in strict liability.

In their brief to this court, the Prudhommes treat the instant issue as a simple matter of the district court's discretion concerning the facts and theories reflected by pleadings and related filings. But none of the cases cited by the Prudhommes comprehends facts even closely approximating a situation in which a party, in moving to amend, states that a cause of action has not been asserted but should be, and then, in response to opposition, seeks and obtains

a court order dismissing the very pleading in which assertion of that cause of action was sought.[6]

If the nature of this case were the same as those cited by the Prudhommes, in which the only issue is the district court's discretion in finding references in the complaint and other pleadings sufficient to put the defendant on notice for the purposes of Fed.R.Civ.P 8 (Rule 8), or the binding effect of pre-trial stipulations under Fed.R.Civ.P. 16 (Rule 16), the abuse of discretion standard might well interdict our reversal of the

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[6] E.G., Syrie v. Knoll International, 748 F.2d 304 (5th Cir. 1984); In Re: Plywood Antitrust Litigation, 655 F.2d 627 (5th Cir. 1981); and Hodges v. U.S., 597 F.2d 1014 (5th Cir. 1979).

district court. Gossamer as is the thread of a strict liability claim against Booker in the fabric of ths case, it might nevertheless have been sufficient to fall within the broad ambit of the district court's discretion.[7] But, as noted above, the procedural

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[7] Despite the contrary allegation in their motion to file a second supplemental and amending complaint, the Prudhommes assert in their brief to this court that the Pre-Trial Order "clearly sets forth the theories of liability against both Booker and Tenneco under strict liability and negligence (see Pre-Trial Stipulation)." We have meticulously reviewed the Joint Pre-Trial Stipulations filed July 23, 1990 (five months before the filing of the Prudhommes' motion to file second supplemental and amending petition, in which they declared that the previous pleadings were devoid of allegations of strict liability as to Booker), but we failed to find that those stipulations "clearly" set forth the Prudhommes' expectation of pursuing a cause of action based on Booker's strict liability. In Section 7, "contested issues of law," the Prudhommes' stipulations cite only one

history of this case -- the motion to amend, opposition, motion to withdraw, and district court's dismissal order -- lifts this case out of the realm of the ordinary and distinguishes it from those cases relied upon by the Prudhommes.

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issue contested by the Prudhommes, and even that one is expressed in the form of a cryptic and non-specific question: "Are the defendants subject to strict liability under Louisiana law or [are] the defendants liable under general negligence." That expression does not even reflect to which of the defendants the Prudhommes have assigned strict liability, negligence, or both. Within Section 7, Tenneco's contested issues of law include negligence under La.Civ.Code art 2315, and negligence under La.Civ.Code arts 2317 or 2322. As to Booker, however, all specific contested issues of law refer to negligence only. While it is possible that Section 7, subsection f, could be read as implying something other than negligence when it refers to "[a]ll those issues of law implicit in the above statements of fact," such a stipulation does not consitute adequate notice within the contemplation of Rule 8.

In that regard, we are puzzled at the failure of both parties to discuss (or even cite) our earlier opinion in Nance v. Gulf Oil Corp.,[8] a case that arose from very similar yet significantly distinguishable facts. In Nance, the plaintiff, who injured his back in a slip-and-fall accident on a drilling platform off the coast of Louisiana, for the first time mentioned the potential strict liability of Gulf in proposed jury charges submitted just a week before trial and over a year after filing his original complaint. Gulf convoked a pre-trial conference five days before trial, but the district court waited until moments before opening statements

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[8] 817 F.2d 1176 (5th Cir. 1987).

to advise the parties that Nance would be permitted to amend his complaint to include strict liability. Noting that "eve-of trial amendments are ordinarily disfavored,"[9] we nevertheless found no abuse of discretion by the district court.

Although there are obvious similarities between Nance and the instant case, Nance is noteworthy here more for the differences between it and this one. For example, we observed in Nance that "{t}he court, in addressing Gulf's complaints, expressly evaluated the new claims in terms of their impact on Gulf's legal posture and its ability to defend the case fairly."[10] We also

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[9] Id. at 1180.

[10] Id. at 1179.

noted in Nance that,"{b}eyond asserting that it was 'hamstrung to meet the new claim,' Gulf has completely failed to articulate the prejudice it faced as a result of this event."[11] Not so in this case; Booker explicitly articulated its prejudice to the district court and again in its brief to us. As Booker shows, it would have produced eyewitnesses for trial testimony, attempted to locate physical evidence, and retained expert witnesses on those aspects of strict liability not common to the issue of negligence if it had even a reasonable basis to expect to encounter strict liability at trial.

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[11] Id.

Similarly, our admonition that "Gulf has done nothing more than allege in vague and conclusory terms that damage it suffered by introduction of a claim which presented no unforeseen issues,"[12] does not apply in this case. Booker supported its assertions of prejudice with facts and logic. And, even though one week before trial was indeed paltry notice to Gulf, it was light years ahead of no notice at all to Booker. But most importantly, Gulf had never been actively misled by the district court, while here Booker was misled by the court when it formally ordered the dismissal of the Prudhommes' proposed amendment that sought to add

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[12] Id.

strict liability as an additional cause of action against Booker. In sum, in light of these significant points of distinction, we find Nance too distinguishable to control.

We are also mindful of a line of Fifth Circuit jurisprudence in which the advance notice requirement of Fed.R.Civ.P. 56 (Rule 56) is construed under circumstances closely analogous to those under Rule 15 here. The common thread in the Rule 56 jurisprudence is the act of the district court in granting a motion for summary judgment months or even years after the non-moving party had been served with the motion. The trial court's grant of such motion usually came at a time when the parties were not expecting a summary judgment to be rendered. Those cases involve such

similar fact patterns as a summary judgment rendered prior to completion of discovery, or during a continuance for further discovery, or simply when nothing else has been going on -- and always when no formal ten-days' notice had been issued by the court to alert the litigants that the court has under advisement the issuance of a summary judgment. Some of our cases have found an abuse of discretion and reversed the district court[13], others have not.[14]

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[13] See Capital Films Corp. v. Charles Fried Productions, Inc., 628 F.2d 387, 391-92 (5th Cir. 1980); Kibort v. Hampton, 538 F.2d 90, 91 (5th Cir. 1976); and Enochs v. Sisson, 301 F.2d 125, 125 (5th Cir. 1962).

[14] See Landry v. Air Line Pilots Assn. Int'l, 901 F.2d 404, 434-36 (5th Cir. 1990); Daniels v. Morris, 746 F.2d 271, 274-76 (5th Cir. 1981); and Hamman v. Southwestern Gas Pipeline, Inc., 721 F.2d 140, 143-44 (5th Cir. 1983).

Writing for this court in Daniels v. Morris[15] Judge Rubin identified the principal distinguishing feature between those cases in which we reversed the district court and those in which we did not -- court-induced prejudicial inaction. For example, the trial court in Capital Films Corp. v. Charles Fried Productions, Inc.,[16] had already docketed the case for trial when, without notice, it granted summary judgment. At one point that court had even stated that it was not going to rule on the motion for summary judgment. There we found that the parties were "induced {by the trial court} to believe the case was

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[15] 746 F.2d at 274-76.

[16] 628 F.2d at 391.

going to trial."[17] As Judge Rubin observed in Daniels, the other line of cases, possibly best illustrated by Hamman v. Southwestern Gas Pipeline, Inc.,[18] involve no indication that the trial court had misled the parties or lulled them into believing that the case would be tried rather than be disposed of by summary judgment. Commenting on the distinction in the divergent lines of cases, Judge Rubin wrote:

> The district court here never induced the parties to believe it would not rule on the motion for summary judgment. The summary judgment issues in this case remained at the forefront of the litigation. The parties continued to address it, albeit in fairly

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[17] Id.

[18] 721 F.2d at 143-44.

> leisurely fashion. When, as here, the parties have been given ample opportunity to respond to the motion for summary judgment, the district judge may rule on it even after a significant delay, without giving the parties advance notice of the court's intention to consider and decide the motion on a "date certain."[19]

Even though the case sub judice involves no rule of statutory notice akin to Rule 56, the parallelism with the summary judgment cases is obvious. The question present in the instant case but absent from those cited for support by the Prudhommes is whether some action of the district court misled the aggrieved party or lulled it into inaction to its prejudice. We conclude that here the district court did so, albeit benignly

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[19] 746 F.2d at 275-76.

and unintentionally, and thereby abused its discretion.

Despite our hindsight ability, and that of the district court, to discern from the extensive pre-trial record in this case an occasional tidbit that might be stretched to imply the lurking existence of a rudimentary claim in strict liability against Booker, the reading of that record as a whole eschews such a conclusion. With the exception of the self-correcting interlude in December of 1990 and January of 1991, involving the second supplemental and amending petition, a view of the record as a whole, from the filing of the original complaint to the day of trial, reveals plaintiffs who consistently assert two causes of action -- negligence and strict liability -- against Tenneco but only one

cause of action -- negligence -- against Booker. That dichotomy is a brooding omnipresence throughout the entire procedural history of this case. It was confirmed by the Prudhommes when belatedly they recognized a need to add a strict liability cause of action against Booker. If, instead of capitulating, the Prudhommes had successfully fought Booker's opposition and persuaded the district court in its discretion to allow the late amendment and add the second cause of action, we may well have affirmed. But when the Prudhommes elected instead to knuckle under, filing a formal motion to withdraw that complaint, they removed any lingering doubt as to their intentions: They would pursue Booker in negligence only, just as they had from the outset.

Even so, if the interlude had ended at that point, our analogy to the summary judgment cases mentioned might not pertain. For it was only when the district court stepped inon January 18th, signing and filing its order to dismiss the complaint in which the Prudhommes for the first time sought recovery against Booker in strict liability, that the analogy ripened to full fruition. The same can be said for the distinction between this case and Nance. That overt act by the district court is the linchpin of this case. It is inextricably intertwined with the issue of Booker's strict liability, requiring us to determine whether the district court misled Booker and induced prejudicial inaction. We find that it did.

In the absence of any appropriate action by the Prudhommes or the district court, or both -- subsequent to the court's order of dismissal but a reasonable time before the trial -- sufficient to conjure up the specter of a strict liability cause of action against Booker, not even the most cautious of defense counsel could reasonably have been expected to be prepared to defend against strict liability when this case went to trial. Requiring counsel to do so under the instant circumstances was fundamentally unfair and unreasonable, the very stuff of which abuse of discretion is made.

That the manner in which Booker was misled rose to the level of prejudice is clear beyond peradventure. As counsel for Booker urged the district court, both

in chambers and in open court at the outset of trial, the defense was lulled into preparing to defend against Booker's alleged negligence only. Understandably, Booker made no efforts to conduct discovery or otherwise obtain expert testimony, eyewitness testimony, or physical evidence relevant to the issue of strict liability. The record and the briefs are silent as to whether, in the meeting in chambers immediately before trial commenced, counsel for Booker moved for a continuance, and no such motion appears in the trial transcript. But inasmuch as the district court had, sua sponte, sprung strict liability on counsel for Booker only moments before the trial, such a motion would clearly have been a vain and useless gesture; only the district court could cure

such prejudicial abuse of discretion by postponing the trial, likewise sua sponte, and that it did not do.

Therefore, we find that when, under the circumstances of this case, the district court granted the Prudhommes' motion and ordered their strict liability pleadings dismissed, it unquestionably led Booker to believe that no such cause of action would be encountered at the trial. In so doing, the district court induced Booker, to its prejudice, to refrain from preparing to defend such a cause of action. We also find that such inducement was detrimentally relied upon by Booker.[20]

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[20] Booker makes the conclusory statement, in its primary brief and again in its reply brief, that the Prudhommes "waived" their right to assert strict liability against Booker when they moved

C. THE MERITS

At the bench trial, the district court found that Tenneco was not responsible to the Prudhommes in either negligence or strict liability. The

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for and obtained a court order dismissing their motion for permission to file a second supplemental and amending complaint. Albeit unartfully, and without citation to authority, Booker appears to be suggesting that the Louisiana concept of estoppel by record, also known as judicial estoppel (as distinguished from estoppel by judgment), would preclude the Prudhommes from prosecuting a cause of action in strict liability against Booker. Broadly, Louisiana recognizes three types of estoppel: equitable estoppel, estoppel by deed, and estoppel by record. See Otto v. Cities Service Co., 415 F.Supp. 837 (W.D.La. 1976). Estoppel by record may occur when a party files pleadings that are detrimentally relied on by an adverse party. See Humble Oil & Refining Co. v. Boudoin, 154 So.2d 239 (La. App. 3d Cir. 1963). Had Booker pursued and developed such a theory on

Prudhommes did not appeal that result. The court also found that Booker was free of any negligence whatsoever, and the Prudhommes did not appeal that result either. In holding Booker strictly liable to the Prudhommes, the district court made only two findings: that the hydraulic hose connected to Booker's equipment ruptured, causing hydraulic fluid to drip onto the deck where Prudhomme was working and where he stepped when he slipped and fell; and that the presence of the hydraulic fluid

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appeal, we might have been constrained under the doctrine of Erie Railroad Co. v. Tompkins, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938), to consider Louisiana's estoppel by record at least as an alternate basis for deciding this case. See Stevens v. New Orleans & Northeastern Railroad Co., 341 F.Supp. 497 (E.D.La. 1972).

on the metal deck was a fifty percent contributing cause of the accident. Having found that the district court abused its discretion in permitting the trial to comprehend the issue of Booker's strict liability, we need not and therefore do not address the propriety of that court's ruling on the merits.

III.

CONCLUSION

Coupled with the Prudhommes' lack of success in all claims against Tenneco and the failure of the Prudhommes' negligence claims against Booker, our reversal of the district court's judgment against Booker on the grounds of strict liability means that the Prudhommes take nothing. For the reasons set forth above we VACATE the judgment of the district court to the extent it held Booker liable

to the Prudhommes in strict liability, but we AFFIRM that judgment in all other respects; and we RENDER judgment in favor of Booker and against the Prudhommes, dismissing their lawsuit with prejudice.

VACATED in part, AFFIRMED in part, AND RENDERED.

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

NO. 91-4473

ANTHONY C. PRUDHOMME, ET AL.,
Plaintiffs-Appellees,

versus

TENNECO OIL CO., Defendant,

BOOKER DRILLING CO., d/b/a Grace Offshore, Co., Defendant-Appellant.

Appeal from the United States District Court for the Western District of Louisiana

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ON PETITION FOR REHEARING
(April 13, 1992)

Before JONES, DUHE and WIENER, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.

IT IS FURTHER ORDERED that the alternative motion for remand is DENIED.

ENTERED FOR THE COURT:

Jacques L. Wiener, Jr., United States Circuit Judge

(2)

Supreme Court, U.S.
FILED
JUL 8 1992
OFFICE OF THE CLERK

NO. 91-1991

In the Supreme Court of the United States

OCTOBER TERM, 1991

ANTHONY C. PRUDHOMME, et. al.,

Petitioners,

vs.

TENNECO OIL COMPANY, et. al.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI BY RESPONDENT BOOKER DRILLING COMPANY D/B/A GRACE OFFSHORE COMPANY

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QUESTION PRESENTED

Whether the Court of Appeals for the Fifth Circuit was within its authority under 28 U.S.C. §2106, to vacate a portion of the judgment of the United States District Court, and render a decision without remand.

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In the
Supreme Court of the United States

OCTOBER TERM, 1991

ANTHONY C. PRUDHOMME, et. al.,

Petitioners,

vs.

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Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI BY RESPONDENT BOOKER DRILLING COMPANY D/B/A GRACE OFFSHORE COMPANY

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit (petitioners' Appendix, page xxix), is reported at 955 F.2d 390. Findings of Fact and Conclusions of Law, and the Judgment of the district court are printed in petitioners' Appendix, at pages xiv and xxv.

SUPPLEMENTATION OF THE BASIS FOR JURISDICTION

The judgment of the court of appeals was entered on March 13, 1992. Rehearing was denied on April 13, 1992 (955 F.2d 390 (5th Cir. 1992), petitioners' Appendix, pages xxix and 1xvii). This Court has jurisdiction under 28 U.S.C. §1254 (1).

SUPPLEMENTATION OF STATEMENT OF THE CASE

The pertinent facts and procedural history of this case are fully reported in the decision of the court of appeals at 955 F.2d 390 (5th Cir. 1992) (also, petitioners' Appendix, at page xxix). It should be clearly apparent from the appellate court's decision and from petitioners' Statement of the Case, that there are no issues of conflict between courts of appeal, decisions of this Court, nor are there any constitutional, or other compelling reasons for granting of a Writ of Certiorari.

This action is one which involves an abuse of discretion by a district court judge, which resulted in an unfavorable decision against defendant, Booker Drilling Company, (Booker). The court of appeals was able to review the entire record, procedural history, and objections preserved by the defendant, and render judgment without remand for the development of additional facts.

Petitioners' Statement of the Case does not begin to explain that the subject of the appeal before the Fifth Circuit was the district court's abuse of discretion in permitting plaintiffs to present evidence of strict liability under Louisiana Civil Code Article 2317. The court of appeal correctly determined from the record, that months before trial and upon formal motion by the Prudhommes, the district court signed and filed an order dismissing the Prudhommes' cause of action in strict liability. The court's order of dismissal mislead Booker into believing that plaintiffs intended to pursue Booker in negligence only, and induced prejudicial inaction on its part with regard to the former strict liability claim. On the morning of trial and despite its recent order, the district court, sua sponte, sprung strict liability on Booker. The district court then

overruled all objections by counsel for Booker and directed the trial to proceed. At the conclusion of the trial, the only basis for liability against Booker was strict liability. Booker was found not to be negligent in any manner.

In vacating the judgment of the district court, the court of appeal commented:

> Not even the most cautious of defense counsel could reasonably have expected to prepare to defend against strict liability when the case went to trial. Requiring counsel to do so under the instant circumstances was fundamentally unfair and unreasonable, the very stuff of which abuse of discretion is made.
>
> That the manner in which Booker was mislead rose to the level of prejudice is clear beyond peradventure.

REASONS FOR DENYING WRIT OF CERTIORARI

1. PETITIONERS' WRIT OF CERTIORARI SHOULD BE DENIED BECAUSE THERE ARE NO COMPELLING REASONS OR MATTERS OF SPECIAL INTEREST WHICH WARRANT THIS COURT'S REVIEW.

Petitioners do not assert that the decision of the court of appeals is in conflict with decisions of other circuit courts, that it is contrary to decisions of this Court, or that there is an important issue of constitutional law. The Petition for Writ of Certiorari is based solely on the premise that the appellate court acted improperly in vacating the lower court's judgment, and in rendering a decision without remand of the case to the district court for further proceedings. Their position, which is clearly contrary to the

statutory authority of the court of appeals under 28 U.S.C. §2106, warrants no further review.

II. THE FIFTH CIRCUIT COURT OF APPEAL ACTED WITHIN ITS AUTHORITY IN VACATING A PORTION OF THE JUDGMENT OF THE DISTRICT COURT, AND IN RENDERING JUDGMENT WITHOUT REMAND.

Federal courts of appeal have the statutory authority to decide matters brought on for review. 28 U.S.C. §2106 provides:

> The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.

The court of appeals is by no means required to remand a case where the record before it is complete and no further findings of fact are necessary. *Richmond Leasing Co. v. Capital Bank, N.A.*, 762 F.2d 1303 (5th Cir. 1985); *Hellenic Lines, Ltd. v. Prudential Lines, Inc.*, 813 F.2d 634 (4th Cir. 1987); *Hutchinson Telephone Co. v. Fronteer Directory Co.*, 770 F.2d 128 (8th Cir. 1985).

As the Federal Circuit Court of Appeals stated in *Consolidated Aluminum Corp. v. Foseco Intern., Ltd.*, 910 F.2d 804 (Fed. Cir. 1990), at p. 814:

> A remand, with its accompanying expenditure of additional judicial resources in a case thought to be completed, is a step not lightly taken and one

> that should be limited to cases in which further action must be taken by the district court or in which the appellate court has no way open to it to affirm or reverse the district court's action under review. See 9C. Wright, A. Miller and F. Elliot, *Federal Practice and Procedure*, §2577 (1971) and Supp. (1990).

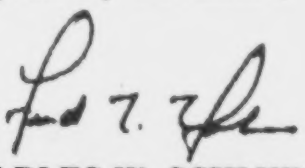
As the court of appeal's decision clearly illustrates, the record is replete with facts and a procedural history which unequivocally support the action taken in view of the district court's abuse of discretion. Petitioners fail to point out a single reason why remand to the district court is an appropriate remedy.

In this particular instance, the district court's abuse of discretion inured to the benefit of petitioners. The Prudhommes were permitted to present all of their evidence in support of their claim of strict liability against Booker. A remand would only serve to allow petitioners "two bites of the apple" or a windfall opportunity to cure the deficiencies of their case which has already been presented to the district court. Since the Prudhommes have already had a full opportunity to present their evidence, the court of appeals has deemed a remand to be totally unnecessary in this case. See *Burriss v. Texaco, Inc.*, 361 F.2d 169 (4th Cir. 1966); *E.E.O.C. v. Westinghouse Elec. Corp.*, 925 F.2d 619, (3d Cir. 1991).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,



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CERTIFICATE OF SERVICE

The undersigned counsel hereby certifies that the Petition of Writ of Certiorari filed on behalf of Petitioners, Anthony C. Prudhomme, et al, was received on June 12, 1992, and that the Opposition to Petition for Writ of Certiorari by respondent Booker Drilling Company, d/b/a Grace Offshore Company, is being filed and served by U.S. mail, first class postage prepaid and upon counsel of record for Petitioners through their attorney of record, Homer Ed Barousse, 129 East Hutchinson Ave., Crowley, Louisiana 70527-0730, this 8th day of July, 1992.